

COMMONWEALTH OF KENTUCKY
MINE SAFETY REVIEW COMMISSION
ADMINISTRATIVE ACTION NO. 06-MSRC-092

JAMES DEAN

PETITIONER

v.

ORDER

COMMONWEALTH OF KENTUCKY,
OFFICE OF MINE SAFETY & LICENSING

RESPONDENT

* * * * *

PROCEDURAL HISTORY

The Petitioner's certificate was suspended pursuant to Kentucky Revised Statutes (KRS) 351.120(12) on October 26, 2006 as a result of his employer's discharge and reporting of an alleged violation of that company's substance and alcohol abuse policy. The Petition of Appeal was filed by Petitioner James Dean on November 22, 2006. OMSL by counsel filed its response on December 5, 2006 and then supplemented the filing with an Affidavit at the Formal Hearing. Subsequent to those filings the Notice Scheduling Formal Hearing and Order to appear ("Order") was mailed regular mail and certified mail to Petitioner. The Notice and Order was delivered to Respondent on or about November 25, 2006.

This matter came before the Mine Safety Review Commission for the hearing scheduled for December 14, 2006. Petitioner appeared at the hearing. At the hearing the Respondent, Kentucky Office of Mine Safety and Licensing ("OMSL") made a presentation of the evidence obtained from the Petitioner's

employer and based upon further investigation conducted subsequent to the filing of its Response. Mr. Dean was present pro se and presented his appeal and had no documents or other evidence to submit and did not call any witnesses.

FINDINGS OF FACT

1. OMSL is the agency charged with administering the Commonwealth's safety laws as set forth in KRS Chapters 351 and 352 and the Kentucky Administrative Regulations adopted pursuant thereto.
2. Petitioner James Dean ("Dean") was residing at all times relevant hereto at: 624 Goodman Ave., Williamson WV 25661, but held certifications required by the Commonwealth of Kentucky for employment.
3. Petitioner Dean is certified as an underground miner by the Commonwealth of Kentucky.
4. Jurisdiction for this action is founded upon KRS 352.390, which provides that the "Mine Safety Review Commission shall revoke, suspend, or probate certificates if it is established in the judgment of the Commission that the holder has become unworthy to hold the certificate by reason of violation of law, intemperate habits, incapacity, abuse of authority, failure to comply with the mining laws of the Commonwealth of Kentucky, or for other just cause;" on KRS 351.025(1), which requires the Department of Mines and Minerals (now the Office of Mine Safety and Licensing) to "promulgate administrative regulations...for the imposition and enforcement of sanctions against certified...personnel...whose intentional violation of, or order to violate, mine safety laws places miners in imminent danger of serious injury or death;" and

on 805 KAR 8:030 ("Criteria for the imposition and enforcement of sanctions against certified miners").

5. Service of the Notice and Order upon Petitioner is determined to be perfected pursuant to 825 KAR 1:020 Section 5 (3) and KRS 13B.050. Petitioner attended and participated in the hearing.
6. Respondent OMSL stated that the Petitioner's employer reported Dean on October 10, 2006 by testing positive on a random drug test for cocaine, the report form was entered as Exhibit 1.
7. Respondent OMSL presented a copy of the October 26, 2006 suspension letter as Exhibit 2 which relied upon Exhibit 1 as forming the basis of the suspension.
8. Respondent OMSL submitted a Medical Review Officer Report from the OMSL office in Pikeville of a controlled substance test from a sample voluntarily submitted by Dean on November 20, 2006. The report showed a positive result for cocaine. This was admitted as Exhibit 3.
9. Respondent OMSL also submitted an Affidavit at the hearing which was admitted as Exhibit 4. This Affidavit was given by James McCown, of the Human Resources Office of Sidney Coal Company in Pikeville, KY. His affidavit stated that all employees were tested on October 6, and the results subsequently verified by a private drug screening contractor, Analabs. Thus upon verification Dean was discharged as stated above.
10. Petitioner James Dean stated that he did not deny the proof offered by OMSL.

11. Petitioner Dean also stated that he did not have any “clean” or “negative” drug tests to present to the commission or any other rebuttal documentation to submit.
12. Petitioner Dean thereafter, moved to restore his certifications by requesting that the Commission sustain his appeal to reinstate his certifications to mine coal in the Commonwealth of Kentucky at this scheduled hearing.

CONCLUSIONS OF LAW

Based upon the evidence admitted, and the record taken as a whole, the Commission finds the foregoing facts are established by a preponderance of the evidence. Pursuant to KRS 13B.090(7) the agency, OMSL, has the burden to show the propriety of the removal of a benefit previously granted and the Petitioner in asserting any affirmative defense has the burden of establishing that defense. Therefore, it was **established** in the judgment of the Commission that holder was unworthy to hold the certificate. Further the Commission finds violations of Kentucky’s mine safety laws set out in the Response of record herein, and therefore Petitioner is subject to the imposition of sanctions as provided in KRS 352.390 and 805 KAR 8:030. Thus Petitioner Dean’s Petition is **DENIED**.

FINAL ORDER

WHEREFORE, it his hereby **ORDERED** by the Mine Safety Review Commission:

1. The Petition of Appeal as to James Dean is **DENIED**.
2. Dean’s miner’s certificates shall be **REVOKED** immediately **for a period of one (1) year**, after such time he may reapply for reinstatement at the discretion of the Mining Board. Prior to Dean’s application for reinstatement

by the Mining Board he must have successfully completed substance abuse counseling as a precondition of reapplying for reinstatement and provide a “negative” or “clean” drug test taken within thirty (30) days prior to the date of his reapplication. If the Mining Board reinstates Dean, he shall be subject to one **(1) year probation if reinstated**. During the probationary period Dean shall submit to drug testing as required by OMSL every thirty (30) days during the (1) year probationary period, and this testing shall be at his expense. Failure to comply with any term of this Order shall be grounds for OMSL to move for permanent revocation of Dean’s certification. If Dean fails to reapply for reinstatement after the one (1) year revocation, his certification shall be permanently revoked.

3. This Final Order only resolves the matters referenced herein, and any new enforcement action or subsequent penalties imposed during any probationary period are in addition to and not in lieu of those that may be sought by OMSL for the acts or omissions during that probationary period. This Final Order in no way prohibits OMSL from investigating or filing legal action based upon other activities or omissions by the Petitioner not arising from the factual basis of the original violation and resolved herein.
4. This Final Order represents a final disposition of all issues between the Petitioner and the Respondent, in these matters. Failure of any party to comply with the terms and conditions of this Final Order may result in further action by the Commission; and
5. Appellate rights: Pursuant to KRS 351.194(8) and KRS 13B.140(1), an appeal of an order of the Commission must be filed in the Franklin Circuit Court

within thirty (30) days of the entry of this Final Order. The petition shall include the names and addresses of all parties of record in this proceeding and shall include a statement of the grounds upon which review is requested. A copy of this Final Order shall accompany the petition. Copies of the petition must be served upon the Commission and all parties of record in this proceeding.

Entered this the 14TH day of December 2006.



DENISE MOORE DAVIDSON, CHAIR
MINE SAFETY REVIEW COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing FINAL ORDER was served by certified mail, return receipt requested, and by regular mail, postage pre-paid to the following this 5TH day of January 2007:

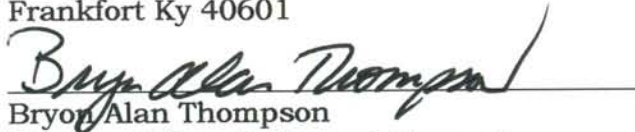
**JAMES DEAN
624 GOODMAN AVENUE
WILLIAMSON, W V 25661**

And by messenger mail to:

Hon. C. Michael Haines
Office of Legal Services
Natural Resources Legal Division
#2 Hudson Hollow
Frankfort, Kentucky 40601
(502) 564-2356
FAX: (502) 564-9212

And the original shall be kept on file:

Mine Safety Review Commission
132 Brighton Park Blvd.
Frankfort Ky 40601



Bryon Alan Thompson
Hearing Officer & General Counsel
Mine Safety Review Commission